

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AUBURN STEEL COMPANY, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1981	:	
through November 30, 1984.	:	

Petitioner, Auburn Steel Company, Inc., Quarry Road, P.O. Box 2008, Auburn, New York 13021, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1981 through November 30, 1984 (File No. 804881).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 17, 1988 at 1:45 P.M., with final briefs submitted on March 3, 1989. Petitioner appeared by Coudert Brothers (E.A. Dominianni, Esq., and Richard A. Horodeck, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether charges for the removal of particulate dust from petitioner's steel mill and the transportation of such dust to a disposal site are subject to sales and use tax.

FINDINGS OF FACT

Petitioner, Auburn Steel Company, Inc., a Delaware corporation, operates a steel mill in Auburn, New York.

The plant was built during 1973 and 1974 and was placed in operation in 1975. The cost of the plant was \$32,000,000.00. More than half of the cost, \$18,500,000.00, was derived from revenue bonds issued by Auburn Industrial Development Authority ("AIDA"). The remainder was derived from subordinated loans.

AIDA is an agency established by the City of Auburn to encourage businesses to locate in the area. It is an industrial development authority exempt from sales and use taxes under the laws of the State of New York.

The AIDA bonds were sold to institutional investors such as John Hancock Life Insurance Company, American Bankers Life Insurance Company and The Bank of New York. There were originally three series of bonds: about \$8,500,000.00 remains outstanding on Series A and Series B, while Series C has been paid. Series A pays tax exempt interest, while Series B

pays non-tax exempt interest.

Petitioner pays the principal and interest on the bonds and also makes a payment to AIDA in lieu of taxes.

The land, buildings and plant equipment are owned by AIDA and are leased to petitioner. Under the terms of the lease, petitioner is required to repair and maintain the facilities on behalf of AIDA.

The remaining bonds mature in 1995. When they are fully paid, the land, buildings and equipment will become the property of petitioner.

The plant utilizes scrap steel, such as reclaimed automobiles, industrial scrap, etc. and melts it in a 70-ton electric furnace to form 5 inch square billets, which are cut into pieces 10 to 30 feet long. While petitioner occasionally sells billets, they are generally used by petitioner to make finished products such as angles, channels and concrete reinforcing bars.

Petitioner has approximately 310 employees, including 4 outside salesmen who work out of their homes. Petitioner has no branch office or plant aside from the Auburn location.

Gases and particulate dust are generated in the course of melting down the scrap steel. The gases and dust are collected in certain equipment called the "baghouse". The baghouse contains numerous cloth filters which trap the dust. The filters are shaken approximately every 20 minutes and dust from the filters falls to conveyer belts. The conveyer belts deposit the dust in two specialized storage bins called "roll-offs", which are sealable, covered receptacles approximately 8 feet by 22 feet, equipped with hatches. The baghouse and roll-offs comprise an enclosed system which prevents the escape of the dust.

Personnel employed by Auburn Container Corporation ("ACC") visit the plant each day and inspect the roll-offs. The roll-offs are removed and weighed. If a roll-off is found to be full, it is replaced by a spare empty roll-off. If it is not full, it is repositioned at the conveyers. Two days of mill operations result in the filling of each roll-off, with one of the two roll-offs removed and replaced each day. Full roll-offs are kept in a roll-off storage area approximately 100 feet from the baghouse.

ACC picks up the full containers and transports them to a secure processing or disposal site. It then returns the empty roll-offs to the plant. ACC never takes title to the dust.

Prior to May 19, 1980, baghouse dust was not deemed hazardous waste and was not required to be kept in sealable containers. Accordingly, it was collected in non-sealable containers and dumped at the local landfill. Federal environmental regulations effective on May 19, 1980 designated the dust as hazardous industrial waste and required that it be kept in sealed containers and be disposed of at a specially designated hazardous waste reclaiming facility or disposal site.¹

Between November 1980 and February 1984, the dust was taken by ACC to IU Conversion Systems, Inc. ("IU") in Honeybrook, Pennsylvania. IU mixed the dust with fly ash from utility plants and with various other chemicals, liquids and cement and the mixture was deposited in a secure landfill site, where it set up as a concrete-like material. The dust absorbed the acids and liquids and encapsulated the fly ash.

¹See 40 CFR 261.3.

Effective February 1984, petitioner shipped the dust to New Jersey Zinc Co. in Palmerton, Pennsylvania. New Jersey Zinc Co. accepted ownership of the dust at its plant scales.

In addition to servicing the roll-offs and transferring the dust to the out-of-state sites, ACC provided normal trash collection services for petitioner approximately three times per week.

Upon audit, the auditor determined that petitioner had not paid sales tax to ACC for servicing the roll-offs and transporting the dust. The auditor treated these services as taxable trash removal services. The auditor also held certain purchases of tangible personal property subject to use tax. These purchases had been made to refurbish the plant due to contamination by radioactive hospital scrap. Use taxes on recurring expenses were also determined.

Petitioner executed four separate consents extending the period of limitation for assessment for the periods at issue to September 20, 1986. On September 19, 1986, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for \$211,129.17 in additional sales and use taxes due, plus interest, for the period December 1, 1981 through November 30, 1984.

Pursuant to a Bureau of Conciliation and Mediation Services conference, the assessment was reduced by cancellation of use tax of \$167,559.35 on the purchases of tangible personal property made to refurbish the plant, as it was shown that said purchases were made on behalf of AIDA. Petitioner paid \$3,092.95 representing the agreed portion of the tax due per audit of \$691.55, plus interest of \$2,401.40² on October 6, 1986. The amount remaining at issue is \$42,878.27 in tax on \$612,546.96 paid to ACC for services pertaining to the removal of the particulate dust.

(a) Petitioner's purchase orders to IU for the period February through December 1981 show that the cost of processing and disposal of baghouse dust was \$33.00 per ton from February 1, 1981 through March 31, 1981, \$34.97 per ton from April 1, 1981 through September 30, 1981, \$35.34 per ton from October 1, 1981 through November 30, 1981 and \$35.20 per ton from December 1, 1981 through December 31, 1983. Effective October 1, 1983 a new Pennsylvania facility closing fee of \$2.13 per ton resulted in a total cost of \$37.33 per ton.

(b) Petitioner's purchase orders to New Jersey Zinc Co. for the period March 1984 through March 22, 1985 show that the price "to cover the cost of beneficial recycling of baghouse dust" was \$35.00 per ton, with an additional charge of \$3.00 per ton for each percentage of zinc content below 20 percent.

With respect to payments to ACC for transporting the dust, purchase orders in the record show the following:

(a) The blanket purchase order for 1981 shows that effective March 1981 petitioner paid ACC \$675.00 per trip for transporting dust containers from the mill to the IU location in Honeybrook, Pennsylvania. A \$1,000.00 per month charge was also imposed for rental of the

²These figures are from the Report of Tax Conference and Form TA-52 (Exhibit "H"). The field audit report (Exhibit "G") shows \$3,100.32 paid, representing tax of \$691.55 and interest of \$2,408.77.

special trailer obtained by ACC for such hauling. The rental charge was to be paid "when applicable".³ Rental was to apply for the period November 19, 1980 through February 19, 1981, with no rental for March 1981.

(b) The blanket purchase order for 1984-1985 shows that ACC's charge "for the transporting of dust containers, as required, from our [petitioner's] plant to New Jersey Zinc Co. in Palmerton, PA" was \$620.00 per trip. This amount was said to also "include rental cost for special trailer obtained by Auburn Container for this purpose."

On October 12, 1983, the Board of Directors of AIDA passed a resolution approving certain purchases of buildings, machinery and equipment by petitioner as agent of AIDA. The resolution reads as follows:

"AUBURN INDUSTRIAL
DEVELOPMENT AUTHORITY

RESOLUTION APPROVING PROPOSED
PURCHASES OF BUILDINGS, MACHINERY AND
EQUIPMENT BY AUBURN STEEL COMPANY,
INC. AS AGENT OF AUBURN INDUSTRIAL
DEVELOPMENT AUTHORITY IN CONNECTION
WITH PROJECT

Whereas Auburn Steel Company, Inc. (Company), the lessee of the Project, has offered to purchase buildings, machinery and

equipment as agent of the Auburn Industrial Development Authority (AIDA), and

Whereas such buildings, machinery and equipment will on purchase become part of the property of AIDA and of the Project as defined in the Indenture and lease, and

Whereas the Company has offered to perform such services as agent for AIDA at no cost to AIDA, and the Company has agreed to (1) be solely responsible for the payment of any and all costs in connection with such purchases, and to make all of such payments directly to the vendors, sellers, shippers or any other persons making any claims in connection therewith, and (2) to save harmless and defend AIDA from any and all costs or liabilities in connection with such purchases, and

Whereas the proposed action is deemed to be a Type II action under SEQR and not to have a significant effect on the environment,

NOW THEREFORE:

Be It Resolved that the proposed action herein is decreed to be a Type II action under SEQR and not to have a significant effect on the environment, and

Be It Resolved that the Auburn Industrial Development Authority (AIDA) hereby approves the proposed purchases of buildings, machinery and equipment by

³Although it is not entirely clear, the trailer rental charge appears to have been applicable only for the period prior to March 1981.

Auburn Steel Company, Inc. (Company) as Agent of AIDA in connection with the Project, and

Be It Further Resolved that all such purchases shall be made in the manner and subject to then [sic] all of the conditions and obligations set forth above and as represented to AIDA, and

Be It Further Resolved that the Company by any exercise of the authority as agent extended authorized [sic] by this Resolution (1) shall be deemed to have accepted all of the conditions set forth herein, and (2) shall make all payments, and save harmless and defend AIDA from any and all costs or liabilities in connection therewith."

After the period at issue, certain purchase orders were stamped with the following legend:

"This purchase order is entered by Auburn Steel Co., Inc. as agent for Auburn Industrial Development Authority, a governmental agency. All invoices, packing lists and correspondence for material and services on the purchase order must be addressed to:

Auburn Steel Company, Inc.
As Agent for
Auburn Industrial Development Authority
P.O. Box 2008
Quarry Road
Auburn, New York 13021"

The two purchase orders in the record refer to erection of a 16 foot by 20 foot by 8 foot building for a gas meter house (purchase order dated October 5, 1988) and a transformer (purchase order dated February 19, 1988). There is nothing in the record to indicate that the legend was stamped on purchase orders during the audit period. The purchase orders to ACC did not bear such stamped legend.⁴

Of the purchase orders in evidence, those pertaining to the rental of rubbish containers and the dumping thereof indicate 7% sales tax; those relating to the rental of dust containers indicate that the transactions were New York State tax exempt, as do those pertaining to the charges for transporting dust to IU's disposal site.⁵ The purchase orders for shipment to New Jersey Zinc Co. bear no reference to sales tax.

SUMMARY OF PETITIONER'S POSITION

Petitioner claims as follows:

- (a) That the particulate dust is tangible personal property with a value and is not

⁴Transcript of hearing, page 76.

⁵The purchase orders for the gas meter house and the transformer (Finding of Fact "23") are also shown to be tax exempt. These items, however, are not at issue.

worthless "trash", the removal of which constitutes a taxable service under Tax Law § 1105(c)(5).

(b) That even if the dust is deemed to be trash for purposes of sales and use tax, the services performed by Auburn Container Corporation are exempt from tax under either Tax Law § 1115(a)(12) or Tax Law § 1105-B(b).

(c) That even if the dust is deemed to be trash for purposes of sales and use tax, all actions taken by petitioner in contracting for disposal of the dust were done for it as the agent of AIDA and thus exempt from tax under Tax Law § 1116(a)(1).

Petitioner submitted 28 proposed findings of fact.

(a) Proposed findings 1 through 19, 21 through 23, 25, 27 and 28 are accepted.

(b) Proposed finding 24 is rejected to the extent that it provides that New Jersey Zinc Co. agreed to pay petitioner a rebate. Exhibit 8 clearly shows that a surcharge would be made if the zinc content of the dust was below 20 percent.

(c) Proposed findings 20 and 26 are rejected, as there is insufficient data in the record to show the exact breakdown of the \$42,878.27 in tax at issue.⁶

CONCLUSIONS OF LAW

A. That Tax Law § 1105(c)(5) provides, in pertinent part, that receipts from every sale, except for resale, of the following services are subject to sales tax:

"Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings."

B. That 20 NYCRR 527.7(b)(2) provides, in pertinent part, as follows:

"All services of trash or garbage removal are taxable, whether from inside or outside of a building or vacant land.

Example 3: A carting firm picks up trash and garbage at its customers' premises and dumps the materials at sites away from its customers' premises.

⁶Petitioner shows the tax at issue as \$42,878.09. This is because petitioner recorded the cancelled portion of the assessment as \$167,559.53 (Exhibit 1) rather than \$167,559.35 (Finding of Fact "19").

Receipts from the sale of this service are taxable."

C. That the primary question in this case is whether or not the baghouse dust was trash within the meaning of Tax Law § 1105(c)(5) and 20 NYCRR 527.7(b)(2). Petitioner's principal argument is that the dust is not trash, because it has value, i.e., elements such as zinc, chromium, etc., contained in the dust could be reclaimed and sold. While it is true that the dust contains elements which are of some intrinsic worth, the value of such elements has not been shown. It appears that the elements do not represent more than a fraction of the cost of disposing of the dust. For example, the total cost of "beneficial recycling" of the dust for the period March 1984 through March 22, 1985 through New Jersey Zinc Co. was \$35.00 per

ton with a surcharge of \$3.00 per ton for each percentage of zinc content below 20 percent (Finding of Fact "20[b]") plus the cost of transportation (the cost of transportation per ton is unknown; the cost per trip is set forth in Finding of Fact "21[b]"). As noted in Finding of Fact "20(a)", the total cost of disposal through IU Conversion Systems, Inc. ranged from \$33.00 per ton in 1981 to \$37.33 per ton in 1983, plus transportation (Finding of Fact "21[a]"). It would appear that the cost of disposal through either New Jersey Zinc Co. or IU Conversion Systems, Inc. was somewhat similar, with the cost through New Jersey Zinc Co. being slightly less, provided that the zinc content of the dust remained at 20 percent. Accordingly, the baghouse dust has not been shown to have more than a minimal economic value but is essentially a waste product of petitioner's steel-making process and as such is trash within the meaning of Tax Law § 1105(c)(5) and 20 NYCRR 527.7(b)(2) (see Rochester Gas and Electric Corp. v. New York State Tax Commn., 71 NY2d 931).

D. That Tax Law § 1115(a)(12) provides, in pertinent part, that receipts from the following are exempt from sales and use taxes:

"Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser."

E. That 20 NYCRR 528.13(d)(1) provides as follows:

"(d) Waste treatment equipment. (1) Machinery and equipment used for disposing of industrial waste, as a part of a process for preventing water or air pollution, will be considered as being used directly and predominantly in production by manufacturing, processing, generating, assembling, refining, mining or extracting, if

(i) the machinery and equipment is purchased by a manufacturer and used predominantly to actually treat, bury, or store waste materials from a production process, and

(ii) over 50 percent of the waste treated, buried or stored results from the production process."

F. Petitioner's reliance on Tax Law § 1115(a)(12) and 20 NYCRR 528.13(d)(1) is misplaced. The baghouse dust was not "machinery and equipment" (see Rochester Gas and Electric Corp. v. New York State Tax Commn., *supra*). Furthermore, petitioner's analogy to waste transmission facilities is insufficient to entitle petitioner to the exemption under Tax Law § 1115(a)(12).

G. That Tax Law § 1105-B(b) provides an exemption for the State tax on receipts from the sale of certain services:

"Notwithstanding any other provisions of this article, but not for the purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (c) of section eleven hundred five on receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be paid at the rate of two percent for the period commencing September first, nineteen hundred eighty and ending February twenty-eighth, nineteen hundred eighty-one and such receipts shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five on and after March first, nineteen hundred eighty-one."

H. That petitioner's argument that the roll-off rotation contracts and roll-off replacement contracts were exempt under Tax Law § 1105-B(b) are without merit. Both services are essentially part of the process of removal of trash from petitioner's leased real property. The services can only be indirectly viewed as servicing tangible personal property used or consumed in production (see also 20 NYCRR § 527.14).

I. That Tax Law § 1116(a) provides sales and use tax exemptions for certain organizations. Subdivision (1) of said section provides that any sale to the following or any use or occupancy by the following shall not be subject to sales and compensating use taxes:

"(1) The State of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another State or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons..."

J. That tangible personal property purchased by an industrial development authority is exempt from taxation by virtue of Tax Law § 1116(a)(1) (Wegmans Food Markets, Inc. v. Department of Taxation and Finance, 126 Misc 2d 144, *affd* 115 AD2d 962; see 20 NYCRR 529.2[a][2]).

K. That while petitioner's purchases of services related to the removal of the particulate dust may have had the incidental effect of benefiting the mill owned by AIDA, such services were not made as agent for AIDA and essentially constituted trash removal for petitioner's steel business and are not exempt under Tax Law § 1116(a)(1).

L. That the petition of Auburn Steel Company, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 19, 1986, as reduced pursuant to the Bureau of Conciliation and Mediation Services conference (Finding of Fact "19"), is sustained.

DATED: Troy, New York
November 30, 1989

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE